MOHD FARIZ MOHD TAIB & ANOR A

v.

ABDUL RAHIM ALIAS & ANOR

HIGH COURT MALAYA, SHAH ALAM B
SURAYA OTHMAN J
[CIVIL APPEAL NO: MT4-12-27-2008]
20 APRIL 2010

DAMAGES: *Personal injury or death - Quantum - Appeal against - Road accident - Failure by Sessions Court Judge to take into account residuals suffered by plaintiffs - Whether current trend of awards in reasonably comparable cases considered - Whether award manifestly low* C

The plaintiffs were involved in an accident which occurred at KM 427, Lebuhraya Utara Selatan Hulu Selangor, Selangor between the plaintiff's D motorcar and the second defendant's motor lorry. The first plaintiff was driving the car in which the second plaintiff was the lawful passenger. The first plaintiff was awarded the sum of RM20,000 for severe perineal injury (anal tear) whereas the second defendant who suffered severe perineal injury, comminuted subtrochanteric fracture femur, and E compression fracture L2 vertebrae was awarded the sums of RM40,000, RM20,000 and RM20,000 respectively. Not satisfied with the awards by the Sessions Court Judge (SCJ), the plaintiffs appealed against the quantum.

Held (allowing the appeal with costs): F

(1) The award by the SCJ was too low and had not taken into account the residuals which the plaintiffs had to suffer and the current trend or pattern of awards in reasonably comparable cases. (para 35)

(2) In awarding the sum of RM20,000 for the injuries suffered by the G first plaintiff, the SCJ referred to the case of *Lim Ah Lak lwn. Charan Singh Mohan Singh & 1 Lagi*. However, the case was decided 13 years ago and under no circumstance can the award in the present case be equated with that case. The SCJ had not considered the fact that as a result of the injuries there was fibrosis H internally which was compounded by the funnelling anus which made the assessment of the plaintiff's contraction of his sphincters difficult. Further, the SCJ had overlooked the fact that the plaintiff might need future surgery for anorectal monometry and an endoanal. Based on the authorities, the SCJ's award was low and I the appropriate sum was RM30,000 taking into consideration the first plaintiff's age and the value of money which had decreased with the advent of times. (paras 9-11, 13 & 15-16)

(3) The second plaintiff's severe perineal injury was more serious than the first plaintiff's injuries whereby he suffered from intermittent episodes of fecal incontinence. Thus, the sum of RM60,000 was appropriate in this case. As for the comminuted subtrochanteric fracture of the left femur, taking into account the residuals that the second plaintiff had to suffer and the trend of current awards, the sum of RM30,000 is more appropriate. Likewise, the sum RM30,000 was awarded for compression fracture L2 vertebrae. (paras 24, 29 & 34)

Case(s) referred to:

Abdul Wahab Zam Zam v. Abdul Wahab Abdullah & Anor [2008] 1 PIR (31) ***(refd)***

Azimi Bahari v. Mohd Zaini Ahmad & Anor [2009] 1 PIR (56) ***(refd)***

Chin Quek Tong v. Mohd Khairul Nizam Zainal Abidin & Anor [2009] 1 PIR 13 ***(refd)***

Chong Peng Kong v. Koh Hong Son [2004] MCL (Issue 4) para 320 ***(refd)***

Chu Kum Seong & Anor v. Abdul Razak Amin [1994] 4 AMR 4198 ***(refd)***

Fatimah Mohammad Jaffar v. Tan Tean See & Anor [2002] Mallal's Digest para 1121 ***(refd)***

Ikhuan Safis Ramli & Anor v. Jeevanath Sakaran & Anor [2008] 1 PIR 51 ***(refd)***

Jelias Anak Nyotet v. See Hua Marketing Sdn Bhd & Anor [2007] 1 PIR (4) ***(refd)***

Kim Sun Kyung & Ors v. Mahyudin Dobik [2007] 1 PIR (72) ***(refd)***

Lim Ah Lak lwn. Charan Singh Mohan Singh & 1 Lagi [1994] 4 CLJ 324 HC ***(refd)***

Lim Yeoh Soon v. Foong Gun Mooi Dass vol 2 p 181 ***(refd)***

Mohd Al Mu'min Shamsudin v. Selamah Jamal & Anor [2008] 2 PIR (9) ***(refd)***

Mohd Faizul Othman & Anor v. Tong Bee Sales Services Sdn Bhd & Anor [2001] MCL (Aug) para 716 ***(refd)***

Paramasivan Savy Peruman v. Ibrahim Mohd Amin & Anor [2008] 2 PIR (10) ***(refd)***

Raji Transport Sdn Bhd & Anor v. Idayu Zulkafli [2004] 5 CLJ 479 HC ***(refd)***

Saiful Herman Omar v. Safzirul Saod [2007] 1 PIR (64) ***(refd)***

Tan Kian Hock @ Chen Jianfu v. Richard Trythall [2000] MCL (Apr) para 203 ***(refd)***

Tan Sock Hoon Patricia v. Ang Kwang Heng [2001] MCJ (May) para 426 ***(refd)***

United Plywood & Sawmill Ltd v. Lock Ngan Loi [1970] 1 LNS 164 FC ***(refd)***

Zhang You Hua v. China Construction (South Pacific) Development Co Pte Ltd [2004] MCL (Issue 4) para 323 ***(refd)***

Zhu Yu Bing v. China Construction (South Pacific) Development Co Pte Ltd [2004] MCL (Issue 4) para 324 ***(refd)***

For the plaintiff - Brijnandan Singh Bhar (Shailender Bhar & Natasha Bhar with him); M/s G Dorai & Co

For the defendant - Christopher Francis; M/s Othman & Co

Reported by S Barathi

JUDGMENT

Suraya Othman J:

Introduction

[1] This is the plaintiff's appeal on quantum against the decision of the Sessions Court Judge ("SCJ") Selayang, Selangor. Parties have filed the agreed facts and in gist they have agreed that on 4 September 2004, an accident occurred at KM 427, Lebuhraya Utara Selatan Hulu Selangor, Selangor between plaintiff's motor car registration No. WFK 6814, driven by the 1st plaintiff and the 2nd defendant's motor lorry No. ACN 5583, driven by the 1st defendant. The 2nd plaintiff was a lawful passenger in motor car WFK 6814 at the material time.

[2] There is no cross appeal by the defendant.

[3] The plaintiffs are unhappy with the awards by the Sessions Court Judge (SCJ) for the following injuries namely:

1st plaintiff (Mohd Fariz bin Mohd Taib)

1. For the 1st plaintiff, for severe perineal injury (anal tear) the SCJ had awarded RM20,000.

2nd plaintiff (Mohd Nazaruddin bin Shamsudin)

For the following injuries suffered by the 2nd plaintiff, the SCJ had awarded:

1. severe perineal injury (anal tear), RM40,000.
2. comminuted subtrochanteric fracture femur, RM20,000
3. compression fracture L2 vertebrae, RM20,000

[4] I shall deal with each plaintiff in turn.

1st Plaintiff (Mohd Fariz Bin Mohd Taib)
For Severe Perineal Injury (Anal Tear) The SCJ Awarded RM20,000

[5] The initial medical report is at p. 80, Record of Appeal (ROA) which at p. 81 ROA states as follows:

- anal tear at 6 O'clock position extending up to the dentate line 3 O'clock extending 1cm above dentate line tear edge is jagged.
- patient had wound debridment and defunctioning sigmoidcolostomy on 5 September 2004 and advice daily dressing.

[6] The plaintiff was sent to be examined by a consultant general and colorectal surgeon for a specialist report (p. 144 ROA) and this is what the surgeon said:

> Based on the medical report, patient had debridement of the perineal wound and creation of a diversion sigmoid colostomy on the 5/9/04. He had 2 subsequently internal perineal wound debridements in the operating room. This was then followed by regular dressings in the ward. Patient subsequently had his colostomy closed in January 2005.
>
> Currently patient has no specific complaints apart from occasional discomfort at the left tower quadrant of the abdomen. He has frequent bowel motions which can be to 4 times a day but he has no problems with continence.
>
> Abdominal examination revealed, an infraumbilical midline scar (laparotomy) measuring 13 cm and a transverses scar at the left iliac fossa measuring 11 cm (stoma).
>
> Perineal examination revealed a large perineal scar extending from the orifice posteriorly measuring about 14 cm. There was a smaller scar at the anterior aspect of the anus and another at the right gluteal region measuring about 1.5 cm.
>
> Patient had a contracted funnel anus which made digital examination difficult. There was fibrosis internally which compounded by the funneling anus made assessment of his sphincters difficult but there was satisfactory contraction on cough.
>
> In summary, this patient has sustained extensive perineal injury as a result of a motor vehicle accident requiring prolonged hospitalisation, repeated operations and regular dressings on his perineum. He required fecal diversion for proper healing of his perineal wounds. Even though he does not have incontinence at present he has frequency of defaceation which may partly be caused by altered anorrrrrectal sensation. He wound require anorectal manometry and an endoanal.

[7] From the specialist report what I can deduce is as follows. The 1st plaintiff had:

(a) debridement of perineal wound (extension perineal injury)

(b) the scar wound was 14cm long

(c) another scar wound at right gluteal region was 1.5cm

(d) had fibrosis internally

(e) funneling anus (wide out and narrowing inside)

(f) this made assessment of his sphincters difficult

(g) required prolong hospitalisation

(h) repeated operations

(i) regular dressing of his perineum

(j) required fecal diversion

(k) has frequency of defaceation

(l) would require anorectal manomety and an endoanal.

[8] For all the above the SCJ awarded RM20,000.

[9] The SCJ referred to the case of *Lim Ah Lak lwn. Charan Singh Mohan Singh & 1 Lagi* [1994] 4 CLJ 324 where for a rupture of anal sphincters, inclusive of the purchase of bags, the court awarded RM20,000.

[10] The above case was decided in 1994 and our present case was decided in 2007, that is some 13 years later and under no circumstance can the award in the present case be equated with the award in *Lim Ah Lak*'s case. In her grounds of decision, the SCJ had not indicated that she had taken into consideration the value of money since 1994. This is an important factor. Nor has the SCJ considered the age of the 1st plaintiff being 20 years old and if he had to have loose motions four times a day it will make his life extremely difficult and will indeed hamper his movements for he has to ensure that there will be a toilet nearby.

[11] In her judgment, the SCJ had not considered the fact that as a result of the injury, there is fibrosis internally which was compounded by the funneling anus which made the assessment of the plaintiff's contractions of his sphincters difficult. Thus the anus became deformed. Compounded to that there were also a number of surgeries.

[12] The SCJ had in making the award of RM20,000 also overlooked the fact that the plaintiff may need future surgery for anorectal monometry and an endoanal.

[13] In the Sessions court learned plaintiff's counsel had requested for RM80,000 contending that RM20,000 was manifestly low and submitted the following cases in support of his claim for RM80,000.

(a) *Abdul Wahab Zam Zam v. Abdul Wahab Abdullah & Anor* [2008] 1 PIR (31) wherein the High Court confirmed the award of the Sessions Court which awarded RM60,000 for ileum perforation and sigmoid color perforation.

(b) *Azimi Bahari v. Mohd Zaini Ahmad & Anor* [2009] 1 PIR (56) for retroperitoneal bleeding with caparotomy where the court awarded RM15,000.

This authority was for a bleed and caparotomy and an award of RM15,000 was made. This injury is minor in comparison to the present case since the residual disabilities in the present case are more serious.

(c) *Paramasivan Savy Peruman v. Ibrahim Mohd Amin & Anor* [2008] 2 PIR (10) for laceration of the liver causing haemoperitoneum for which the Plaintiff underwent laparatomy an award of RM70,000 was made in 2007.

[14] The defendant on the other hand submitted the case of *Tan Sock Hoon Patricia v. Ang Kwang Heng* [2001] MCJ (May) para 426 where the court awarded S$7,000 for laceration at perineum with bleeding and submitted that RM8,000 is sufficient for the present case.

[15] Perusing the cases cited, I agree that the SCJ's award of RM20,000 is on the low side. The case which she used as a basis of her award of RM20,000 was a case that was decided in 1994. Our present case was decided in the year 2007, 13 years later. The case of *Lim Yeoh Soon v. Foong Gun Mooi Dass* vol. 2 p. 181 is pertinent where it was held as follows:

> I took into consideration all the relevant factors, including the increase in the cost of living in this country since the last five to fifteen years. It would be appropriate, as in the above quoted Singapore case, to rely on the following judgment of Lord Denning MR in *Senior v. Barker & Allen Ltd.*
>
> ... I should like to draw attention to the fact that in 1953 in this court in an accident of almost identical description to a man of 24, the judge had awarded only £750.00 general damages and this court increased them to £2,100.00, making £2,500.00 in all. That was in the year 1953. We all know how the value of money has changed since that time. This award of £7,000.00 today show how the judges keep pace with the times. This figure and I think Mr Davies agreed on behalf of the boy, is far higher than would have been given a few years ago. Wages have gone up, money has altered and so the sum which are awarded have gone up, I must say that I can see no error in the sum which the judge awarded and I would dismiss the appeal.

[16] Therefore in the circumstances, I feel the sum of RM30,000 is appropriate in this case, taking into consideration the 1st plaintiff's age and the value of money which has decreased with the advent of times.

[17] Now I turn to the injuries suffered by the 2nd plaintiff.

2nd Plaintiff (Mohd Nazaruddin bin Shamsudin)
For Severe Perineal Injury (Anal Tear) The SCJ Awarded RM40,000

[18] The 2nd plaintiff suffered even more serious injuries than the 1st plaintiff.

[19] The initial medical report of the 2nd plaintiff can be found at p. 82 ROA and under diagnosis it is stated as follows:

> Ragged laceration of anal canal from 1 to 3 O'clock extending about 1 cm above dentate line with devascularised tissue++.
>
> Recommendation
>
> Defunctioning sigmoidcolostomy to protect anal injury.

[20] The specialist report on the 2nd plaintiff's injury can be found at p. 146 ROA and it reads as follows:

> He was admitted at Hospital Selayang and was operated on the same day.
>
> He had the following surgeries:
>
> 1. Laparotomy and creation of a diversion colostomy
>
> Patient required further dressings and regular perineal wound surveillance at regular intervals in the ward. He had his stoma closed in September 2005.
>
> His current complaints include intermittent episodes of fecal incontinence and staining of his underwear especially to liquid stools. He has the occasional episodes of fecal staining of his underwear. He also complaints of intermittent colicky lower abdominal pains.
>
> Physical examination revealed:
>
> Perineum - a deformed anal orifice with a scar at the left lower segment measuring about 4 cm. A separate scar at the right gluteral region measuring about 6cm, there was no tenderness or induration at the scars.
>
> He has anal incontinence to liquid stools and he probably has to live with this throughout his life.
>
> If ever he opts for surgical correction, he would require further evaluation first in the form of anorectal manomentry and physiology studies and an endoanal U/S keeping in mind that surgical repair of his sphincters would not guarantee success.

[21] From the medical and specialist reports, I can deduce as follows. The 2nd plaintiff had:

(a) laparotomy done

(b) creation of a diversion colostomy

(c) debriement of the perineal wound

(d) stoma closed

(e) suffers from intermittent episodes of fecal incontinence

(f) liquid stools

(g) colic pains

(h) deformed anal orifice

(i) has to live with liquid stools and incontinence for life

(j) will require manomentry and an endoanal.

(k) surgery will not guarantee success.

[22] Plaintiff's counsel referred to the same authorities and contended that the 2nd plaintiff suffered more severe injuries than the 1st plaintiff since the 2nd plaintiff suffers from intermittent episodes of fecal incontinence and prayed for the sum of RM100,000.

[23] The defendant's counsel submitted the case of *Tan Sock Hoon v. Ang Kwang Heng (supra)* and the case of *Chong Peng Kong v. Koh Hong Son* [2004] MCL (Issue 4) para. 320 where the court awarded RM25,000 for degloving injury of the signoid colon and submitted that RM12,000 is a fair figure.

[24] Taking into account that the injuries suffered by the 2nd plaintiff is more serious than the 1st plaintiff and he suffered from intermittent episode of fecal incontinence, I feel the sum of RM60,000 is appropriate in this case.

For Comminuted Subtrochanteric Fracture Of Left Femur The SCJ Awarded RM20,000

[25] The specialist report can be found at p. 148 ROA. The injuries suffered are as the following:

The injuries: Fracture subtrochanteric left femur

The left hip was operated upon eight times.

Present Complaints

1. He is unable to sit in one position for long
2. He has pain in the left thigh during cold weather
3. He walks with a limp
4. He is unable to run or play games
5. He is unable to lift heavy weights

Physical Examination

His general health is satisfactory. The following are significant findings on examination:

Deformities
There is shortening of the left lower limb.

Measurements
There is 1.0 cm of shortening of the left thigh.
There is 2.5 cm of wasting of the left thigh
There is 0.5 cm of wasting of the left calf.

Movements

	Right	Left
External rotation	0° - 140°	0° - 140°
Internal rotation	0° - 80°	0° - 60°
Abduction	0° - 60°	0° - 40°

There is limitation of the left hip movements.

The Gait
There is a limp on the left side. Squatting and rising is with difficulty.

X-Rays
Left femur - there is evidence of a comminuted subtrochanteric fracture of the femur. It had malunited with some overriding.

OPINION
The injuries had healed with the following disabilities:
The comminuted subtrochanteric fracture of the left femur had malunited with overriding and shortening of the thigh. These are permanent disabilities.
The stiffness of the left hip is secondary to scarring of the thigh and hip muscles and to prolonged immobilization and disuse of the joint. This may not improve fully with physiotherapy.
This wasting of the left thigh and calf muscles is due to prolonged disuse of the limb. This too, may not improve fully with physiotherapy.

[26] From the report, the summary of injuries and residuals are as follows:

1. a comminuted fracture ie the femur at the fracture sight has broken into pieces.
2. there is 1 cm shortening of the femur.
3. there is 2.5cm wasting of thigh muscles
4. there is 0.5 cm wasting of calf muscles
5. squatting and rising with difficulty
6. limp on the left leg
7. malunited femur
8. stiffness in the left hip
9. inability to play games
10. inability to lift heavy objects
11. inability to sit in one position for long.

[27] Counsel for the plaintiff submitted that RM20,000 awarded by SCJ is too low and prayed for RM50,000. He submitted the following cases to support his contention.

(a) In *Jelias Anak Nyotet v. See Hua Marketing Sdn Bhd & Anor* [2007] 1 PIR 4 for comminuted mid shalf of right femur with no disabilities suffered, an award of RM25,000 was made in 2007.

(b) In *Ikhuan Safis Ramli & Anor v. Jeevanath Sakaran & Anor* [2008] 1 PIR (51), for close fracture of right femur with 1 cm shortening and no other disabilities suffered, an award of RM30,000 was made in 2005.

(c) In *Chu Kum Seong & Anor v. Abdul Razak Amin* [1994] 4 AMR 4198 for fracture of femur, the High Court awarded RM35,000 in 1999.

(d) In *Chin Quek Tong v. Mohd Khairul Nizam Zainal Abidin & Anor* [2009] 1 PIR (13) for closed fracture of right femur with 1.5 cm shortening, difficulty in walking, running, standing, kneeling, squatting, lifting heavy objects, climb stairs and sitting on the floor when praying, the court awarded RM50,000.

[28] Counsel for the defendant submitted that RM12,000 is sufficient and gave the following cases below as his basis.

(a) In *Tan Kian Hock @ Chen Jianfu v. Richard Trythall* [2000] MCL (Apr) para 203, the court awarded RM 12,000.00 for closed fracture of left femur with 1 cm shortening and 1 cm wasting of left thigh.

(b) In *Mohd Faizul Othman & Anor v. Tong Bee Sales Services Sdn Bhd & Anor* [2001] MCL (Aug) para. 716 RM15,000 was awarded for comminuted fracture of upper third of right femur.

[29] Therefore, taking into account the residuals that the 2nd plaintiff has to suffer and the trend of current awards, I feel the sum of RM20.000 is too low and RM30,000 is more appropriate.

For Compression Fracture L2 Vertebra The SCJ Awarded RM20,000

[30] The 2nd plaintiff's specialist report can be found at p. 148 ROA.

The injuries are as follows:

PRESENT COMPLAINTS

1. He has pain in the midback on exertion
2. He is unable to run or play games
3. He is unable to lift heavy weights

PHYSICAL EXAMINATION

The following are significant findings on examination:

X-RAYS

1. Lumper Spine:

   There is evidence of a compression fracture of the L2 vertebra. It had malunited with about 20% of anterior wedging.

OPINION

The injuries were:

- Stable compression fracture of the L2 vertebra

The injuries had healed with the following disabilities:

- pain in the midback on exertion
- inability to sit in one position for long

- inability to run or play games

- inability to left heavy weights

The fracture of the L2 vertebra had malunited with moderate anterior wedging. This is a permanent disability.

The pain in the midback is due to the malunited fracture of the vertebra. It is also the cause of his difficulty to sit for long. These will be permanent disabilities. He will require medication and physiotherapy on and off. A course of physiotherapy may cost about RM750.00.

[31] From the report, in summary the plaintiff has the following injury and disabilities:

(a) compression fracture of L2

(b) unable to sit for long

(c) unable to play games

(d) unable to lift heavy weights

(e) pain in the back on exertion

(f) L2 vertebra malunited with about 20% anterior wedging

(g) will require medication and physiotherapy.

[32] The plaintiff's counsel submitted for RM45,000 based on the following cases:

(a) In *Saiful Herman Omar v. Safzirul Saod* [2007] 1 PIR (64) for a burst fracture of L2 vertebra with partial neurological deficit of the left lower limbs an award of RM40,000 was made.

(b) In *Kim Sun Kyung & Ors v. Mahyudin Dobik* [2007] 1 PIR (72) for fracture of the C2 vertebra with listhesis over the C3 vertebra an award of RM35,000 was made.

(c) In *Raji Transport Sdn Bhd & Anor v. Idayu Zulkafli* [2004] 5 CLJ 479 for fracture of C1 vertebra a sum of RM30,000 was awarded in 2004.

(d) In *Mohd Al Mu'min Shamsudin v. Selamah Jamal & Anor* [2008] 2 PIR (9) for malunited fracture of the L1 vertebra with right lateral angulation of 15 degrees, a sum of RM30,000 was awarded in 2007.

[33] Defendant's counsel on the other hand, submitted that RM8,000 is sufficient and submitted the following cases to justify his contention.

(a) In *Fatimah Mohammad Jaffar v. Tan Tean See & Anor* [2002] Mallal's Digest para 1121 the court awarded S$12,000 for severe compression fracture of L1 vertebra.

(b) In *Zhang You Hua v. China Construction (South Pacific) Development Co Pte Ltd* [2004] MCL (Issue 4) para 323 the court awarded S$15,000 for prolapsed SGD intervertebral disc at L5-S1 with disabilities, marked restriction of back movements on forward flexion, the fingertips only reached knee level and sensory loss over the left L5 dermatone.

(c) In *Zhu Yu Bing v. China Construction (South Pacific) Development Co Pte Ltd* [2004] MCL (Issue 4) para 324 the court awarded RM17,000 for fracture T11 and compression fracture T12 vertebrae. The residuals are permanent back pain, unlikely to manage any occupation that requires heavy manual work and the stiffness in his spine which may increase with time.

[34] Therefore after taking into account the residuals that the 2nd plaintiff has to suffer, I feel a sum of RM30,000 is more appropriate.

Conclusion

[35] In summary the award by the SCJ is too low and has not taken into account the residuals which the plaintiffs has to suffer and the current trend or pattern of awards in reasonably comparable cases. In the case of *United Plywood & Sawmill Ltd v. Lock Ngan Loi* [1970] 1 LNS 164; [1970] 2 MLJ 237 238 Gill FJ stated:

> As has been said again and again, the assessment of damages in cases of personal injury is one of the most difficult things for either a judge in the first instance or a Court of Appeal. When a man has lost his arm there is no sum in the world that can be in the true sense compensate for it. Yet compensation in the form of money is the only way in which he can be granted redress for injury he has suffered. It is neither possible nor desirable for damages for the loss of an arm to be standardised or rigidly classified, as no two cases are ever alike. But in order to maintain some semblance of uniformity, the amount awarded in past cases, which bear reasonable comparison with the case under review, should serve as useful guide. The general principle is that an appellate court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the court exclaim. 'Good gracious, is that the sum which has been

A awarded that sum must be altered', or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate.

[36] In that light, the appeal by the plaintiff's are allowed. Cost here and below are also allowed and to be taxed. Deposit is to be refunded B to the appellant.

Appeal allowed with costs.

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